

refused twice to make a counter offer. Later, the incumbent informed the PCS licensee that it would like \$1,000,000 for each relocated link (a total of \$4 million) and payment of its consulting fees of \$250,000.

10. The incumbent is a utility company which has twenty-two links, twenty-one of which are analog systems ranging from 132-480 channels. The PCS licensee estimated relocation costs at \$4 million. At the first meeting, the incumbent requested \$22 million to relocate its network. The incumbent based its request on the book value recovery, replacement value, territorial value, and speed of relocation. In addition, the incumbent added in the cost of relocating several links in the network which the PCS licensee will not need to relocate. The incumbent has also requested that the PCS licensee pay its consultant costs.
11. One PCS auction winner has been asked to participate in a venture which plans to buy the relocation rights to microwave links in the 2 GHz band and then resell the rights to PCS providers.

Volume IV, Spring/Summer 1995

KELLER AND HECKMAN

Opportunity Knocks for 2 GHz Incumbents**FCC Announces Commencement of Voluntary Negotiations***by Raymond A. Kowalski*

Now that the auctions for Block A and B PCS licenses are closed, the next step toward the creation of PCS systems in the United States is the relocation of point-to-point microwave systems that presently occupy the 2 GHz band earmarked for PCS systems. PCS licensees ultimately can leave the microwave incumbents to leave the band by providing them with "comparable facilities." However, before the two sides resort to such involuntary relocation, the Federal Communications Commission (FCC) is hoping that they will be able to come to mutually agreeable means for early and voluntary microwave system relocation.

On April 18, 1995, the FCC officially announced that the period of voluntary negotiations between microwave incumbents and the winners of the A and B block PCS auctions had begun as of April 5, 1995. Under the FCC's rules, this voluntary negotiation period will run for two years, except for incumbent public safety microwave systems, which will have three years for voluntary negotiations.

Microwave incumbents now are beginning to receive overtures from agents for the PCS auction winners. As the negotiations commence, it is vital for microwave incumbents to understand what is being negotiated during this period. Although the PCS auction winners might indicate otherwise, these negotiations are not about "comparable facilities." Rather, they are about the early and voluntary

departure of the microwave incumbents from the 2 GHz band.

The issue of "comparable facilities" has almost nothing to do with this phase of the negotiations. The requirement for the PCS licensees to provide the microwave incumbents with "comparable facilities" comes into play only when an incumbent microwave licensee is being "involuntarily" relocated under the FCC's "mandatory" relocation rules. Involuntary relocation, however, may not be rushed for three to five years.

Keller and Heckman is counseling its clients that this initial voluntary negotia-

tion period is not about engineering or "comparable facilities." It is about the marketplace.

The FCC's mandatory relocation rules preserve the microwave incumbents' rights, but there is no magic formula to accomplish that goal. During the voluntary relocation period, microwave incumbents are free to negotiate whatever terms and conditions they believe are appropriate under the circumstances.

The questions and answers on page 3 may help incumbent microwave licensees understand the nature of the voluntary negotiation period. ♦

Keller and Heckman Takes on PCIA

Ten days after the FCC announced that the voluntary negotiation period had begun, PCIA, the trade association for the PCS industry, wrote a letter to FCC Chairman Hundt, seeking to change the ground rules.

PCIA denied the possibility that incumbent microwave licensees might try to extract "excessive payments" from PCS auction winners during the voluntary negotiations. Therefore, it asked the Chairman to eliminate the voluntary negotiation period, end the allowable compensation and do away with the microwave licensee's right to restoration of its 2 GHz system if its replacement system turns out to be inadequate.

Learning of this letter, Keller and Heckman wrote to Chairman Hundt, defending the incumbents' rights to negotiate the best terms possible for their early and voluntary departure from the 2 GHz band.

This attempt to intimidate microwave incumbents and to contaminate the negotiation process is ample evidence of the tactics that will be employed against unwary microwave licensees.

More 2 GHz Relocations

FCC Proposes Reallocation of Spectrum for Mobile Satellite Service*by John Reardon*

Despite previous indications that use of the bands in the 2 GHz range would not be changed for the foreseeable future, the Federal Communications Commission (FCC) has adopted a Notice of Proposed Rule Making in ET Docket 95-18 (Notice) that looks toward reallocating the bands 1990-2025 MHz and 2165-2200 MHz for use by the Mobile Satellite Service (MSS).

Incumbent licensees currently operate a significant number of stations in these bands. Like the incumbent licensee who must move in order to make room for Personal Communications Services (PCS), these licensees also will be required to relocate their facilities if the FCC's proposal becomes final.

The 1990-2025 MHz band is part of a band that is currently allocated for the Broadcast Auxiliary Service (BAS). The FCC proposes to relocate BAS incumbents to the band 2110-2145 MHz and to force MSS licensees to pay the costs of this relocation.

The 2110-2145 MHz band, however, is currently used by common carrier fixed microwave services and private operational-fixed microwave services. In its Notice, the FCC stated that it believes that sharing between BAS and these fixed microwave services is not feasible. Therefore, before the BAS licensees can be moved into this band, the incumbent fixed microwave service licensees must be moved out.

Like the 2110-2145 MHz band, the 2165-2200 MHz band also is currently used by common carrier and private operational-fixed microwave services. They also must be moved before the band can be used by MSS providers.

The MSS providers would be required to pay the incumbents' relocation expenses, build new facilities for the incumbents, and demonstrate that these new facilities are "comparable" to the incumbents' former facilities. The new facilities would be built and tested by the MSS provider before relocation would occur. Should the new facilities prove within one year not to be equivalent in every respect to the former facilities, the MSS provider would have to pay to return the incumbent to its former facilities until full equivalency is attained.

Note that MSS providers would be forced to finance the relocations of both incumbent BAS licensees and fixed microwave licensees. The Notice is not clear on the time frame, but sources at the FCC indicate that there would be a three

year negotiation period similar to that provided licensees in the band 1850-1990 MHz.

In a footnote, the FCC proposed to eliminate primary licensee status after January 1, 1997, for licensees in the Private Operational-Fixed Microwave Service that are notified of a request for mandatory relocation. This is a significant departure from the policy that now governs the relocation of microwave incumbents to make room for PCS. These licensees will not lose their primary status until their comparable facilities have been built and tested.

The FCC proposes to award the new MSS licensees through competitive auctions, utilizing simultaneous multiple round bidding. ♦

For further information contact the editor:

Raymond A. Kowalski, Law Offices of Keller and Heckman, Washington Center, Suite 500 West, 1001 G Street, N.W., Washington, D.C. 20001, Tel. (202) 434-4230, Fax (202) 434-4646. (This newsletter may be copied or quoted, so long as proper attribution is given. Articles are on topics of general interest and do not constitute legal advice for particularized facts.)

KELLER AND HECKMAN PRACTICE AREAS:

ANTITRUST ♦ ENVIRONMENTAL ♦ FOOD AND DRUG ♦ LITIGATION
TELECOMMUNICATIONS ♦ OCCUPATIONAL SAFETY AND HEALTH
LABOR AND EMPLOYMENT ♦ TRADE ASSOCIATIONS
TRANSPORTATION ♦ GENERAL CORPORATE AND BUSINESS
INTERNATIONAL TRADE

Understanding Voluntary Negotiations

Q. If "comparable facilities" are not being negotiated during this voluntary negotiation period, what is?

A. Among other things, the price for the incumbent's early and voluntary departure from the 2 GHz band.

Q. Do I have to negotiate with the agent of the PCS auction winner if I am contacted?

A. No. Negotiations are not required during the voluntary negotiation period. A mandatory negotiation period will follow the voluntary negotiation period.

Q. If I choose to negotiate, do I still have the right to comparable facilities?

A. Comparable facilities is your worst-case scenario. Even if you are eventually relocated involuntarily, you are always entitled to comparable facilities. If you relocate voluntarily, you are entitled to anything that is mutually agreeable.

Q. Does that include upgraded, digital facilities?

A. It can include upgraded, digital facilities, dedicated wire-line facilities, fiber-optic facilities, or no facilities, that is, a cash payment — whatever you both agree to.

Q. Why would a PCS licensee agree to give us more than "comparable facilities" when they don't have to?

A. Some PCS licensees, especially those in major markets, may be willing to give you an incentive in return for your agreement to vacate the 2 GHz band early.

Q. Can I demand to be relocated early?

A. No. The PCS auction winner is in control of the timing of the negotiations. In fact, PCS auction winners may never initiate negotiations if they believe that their systems can be engineered in such a way as to not cause interference to your microwave system. However, they would be required to send you "prior coordination notices" if they are going to try to engineer around your microwave system.

Q. If we don't agree to relocate early, don't we risk the unavailability of microwave channels in the 6 GHz band to accommodate our new system?

A. Yes, but it is not your problem; it is the PCS licensee's problem. The PCS licensee will always have the burden to provide you with comparable facilities if you are required to relocate. If they cannot do so, you do not have to move. You cannot be accused of failing to bargain in good faith if you do not negotiate during the voluntary period.

Q. If we strike a deal for early and voluntary departure from the 2 GHz band, do we still have the right to be relocated back to the 2 GHz band within a year if our new system is not satisfactory?

A. Not necessarily. The right to be relocated back to the 2 GHz band applies only to an involuntary relocation. In the voluntary negotiations, you do not have the right to be relocated back to the 2 GHz band unless you negotiate it.

Q. So giving up the relocation right is another reason why the PCS licensee might be willing to give us more than "comparable facilities?"

A. Precisely.

"...this initial voluntary negotiation period is not about engineering or 'comparable facilities.' It is about the marketplace."

- Lead Story

Congress Enacts Last Minute Tax Measures

2 GHz Microwave Incumbents Could Benefit From Tax Break

by Tamara Y. Davis

As part of a package of last minute tax measures, Congress has authorized the Federal Communications Commission (FCC) to issue Tax Certificates to 2 GHz microwave incumbent licensees who enter into voluntary negotiations for the relocation of their microwave facilities. The authority for issuance of Tax Certificates to 2 GHz microwave incumbents is now contained in Section 1033 of the Tax Code.

This action permits tax-free treatment for transactions between PCS licensees and incumbent microwave operators who voluntarily move from the 2 GHz band. Since relocation to different frequency bands (or other media) is necessary to clear the band for PCS technology,

Congress classified such transactions as " involuntary conversions" within the meaning of Section 1033 of the Tax Code.

Section 1033 permits a taxpayer to defer any gain on property sold or exchanged as a result of an involuntary conversion. To defer the gain, the transaction between a microwave incumbent and an A or B Block PCS auction winner must occur before March 13, 1998. The taxpayer must (1) reinvest the proceeds of the transaction in property which is similar to or related in service or use to the property which was converted; (2) obtain a certificate from the FCC, clearly identifying the property, and showing that the transaction was necessary or appropriate to

effectuate the FCC's microwave relocation policy; and (3) file a statement showing this tax treatment in the year the sale or exchange occurred. The election must be filed at the time of the sale and cannot be filed as part of an amended return.

Depending on the age of a company's 2 GHz microwave facilities and its treatment of depreciable property, its 2 GHz facilities may already be fully depreciated. Without this relief, any value realized for the system would be treated and taxed as a capital gain. ♦

TELECOMMUNICATIONS

KELLER AND HECKMAN

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32(2) 732-3280

[REDACTED]



Phone (202) 331-76
Fax (202) 331-76

November 21, 1994

IMPORTANT INFORMATION FOR ALL 2 GHz LICENSEES

Big Money and Your 2 GHz Microwave Band Relocation

Dear 2 GHz Licensee:

The Federal Communications Commission (FCC) has received 74 applications to participate in an auction, beginning December 5, 1994, of 99 Major Trading Area licenses to provide Personal Communications Services in the 2 GHz band (broadband PCS) on frequency Blocks A and B.

As expected, the bidders for the MTA licenses include some of the largest telecommunications companies in the United States. Among those submitting applications were:

- Associated Vencap (Associated Communications)
- AT&T Wireless PCS Inc.
- Continental Cablevision, Inc.
- Radiofone Nationwide Paging Services, Inc.
- American Portable Telecommunications, Inc.
- WirelessCo, Limited Partnership (Consortium of Sprint, Comcast, Cox Communications and Telecommunications, Inc.)
- GTB Macro Communications Corporation
- PCS Primeco Limited Partnership (Consortium of Nynex, Bell Atlantic, US West and Air Touch)
- BellSouth Personal Communications, Inc.
- Concord Telephony Services II, Inc.
- Cox Cable Communications, Inc.
- Pacific Teleco Mobile Systems
- Southwestern Bell Mobile Systems, Inc.

I also wanted you to realize that 74 PCS providers:

- ☒ Are investing "big" money.
- ☒ Want their investment to work.
- ☒ May be the proud owners of your 2 GHz microwave license in the very near future.
- ☒ Are in a hurry to enter the market.

AND WHAT HAVE YOU DONE?

- ☒ Will you be ready for the transition?

FROM: POLA

FROM: POLA

SENT BY APC

12- 7-94 3:47PM

APC-

2027850721.8 3/

IMPORTANT INFORMATION FOR ALL 2 GHz LICENSEES

Page 2

These applicants were required to submit their upfront payment for the December 5 auction by Friday, November 18, 1994.

For example, the upfront payment by a PCS provider for the following four Major Trading Areas, consisting of either one or two 30 MHz MTA Frequency blocks, amounted to:

<u>Market No.</u>	<u>Major Trading Area</u>	<u>Population</u>	<u>Upfront Payment</u>	<u>Block(s)</u>
M-1	New York	26,410,597	\$ 15,846,359	B Only
M-3	Chicago	12,069,700	\$ 7,241,520	A & B
M-10	Washington-Baltimore	7,777,875	\$ 4,666,725	B Only
M-34	Kansas City	2,913,304	\$ 1,747,983	A & B

* Upfront Payment = Population x Block Size in MHz x \$.02

The upfront payment is small compared to the "big money" the successful bidder will have to pay for a PCS license in the December 5, 1994 auction.

Money issues are always interesting and intriguing. Following is an example of the amount of investment which might be made by a PCS provider for the Major Trading Area No. 10, Washington-Baltimore:

Market No: 10
Major Trading Area: Washington-Baltimore
Upfront Payment: \$ 4,666,725

Interest otherwise earned on upfront payment:

8% YEARLY INTEREST RATE OTHERWISE EARNED: \$ 373,300
8% MONTHLY INTEREST RATE OTHERWISE EARNED: \$ 31,100

Possible Auction \$752,000,000
Bidding Price for MTA No. 10 due and payable 5 days after the license has been awarded.

Interest otherwise earned on auction investment:

8% YEARLY INTEREST RATE OTHERWISE EARNED: \$ 60,160,000
8% MONTHLY INTEREST RATE OTHERWISE EARNED: \$ 5,000,000

IMPORTANT INFORMATION FOR ALL 2 GHz LICENSEES

Page 3

Marketing issues are also very interesting. Now that we have learned how the PCS provider who invested in the Washington-Baltimore License Block B could receive, conservatively speaking, a monthly interest of — WOW! — \$5,000,000 on his auction investment, we can determine without a doubt that the PCS provider will be most anxious to enter the PCS market in a hurry to recoup its investment. The PCS provider needs to enter the market the minute he has been issued the 2 GHz license. *The PCS provider cannot afford to lose \$5,000,000 per month and more, especially since he will have to spend millions or even billions more to build his network.*

NOW THE MOST IMPORTANT QUESTION, YOU THE 2 GHz LICENSEE SHOULD ASK:

"What have I done to be ready for the transition?"

Over the past several months we have suggested that you plan early. We asked you to address crucial decisions about your relocation, such as:

- Where to go?
- What should the compensation package include?
- What negotiation strategy should I employ?

Are you prepared to accomplish this major transition task alone? If not, UTC Service Corporation and its Transition Team can assist you.

Call us today toll-free at 1-800-900-4882 and find out how we can assist you in relocating from the 2 GHz band.

Sincerely,



Trudy Richmond
Marketing and Sales Manager

**2 GHz MICROWAVE RELOCATION
CONSULTANT AGREEMENT**

BETWEEN THE

CITY OF SAN DIEGO

AND

KELLER AND HECKMAN

DOCUMENT NO, **C-06186**
FILED **MAY 22 1995**
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

This AGREEMENT is made, entered into and effective as of the date executed by the City of San Diego, hereinafter referred to as "City" and Keller and Heckman, a partnership organized and existing under the laws of Washington, D.C., hereinafter referred to as "Consultant".

WITNESSETH

WHEREAS the Federal Communications Commission has adopted rules to require existing 2 GHz fixed microwave licensees to relocate to other frequency bands to accommodate Personal Communications Service (PCS) providers; and

WHEREAS the City of San Diego is presently a holder of 2 GHz fixed microwave licenses and may be required to vacate these frequencies pursuant to a negotiated agreement with the Personal Communications Service 2 GHz licensees; and

WHEREAS the City requires professional consulting services to be performed in connection with the FCC mandated Personal Communications Services (PCS) 2 GHz relocation; and

WHEREAS the Consultant and its subconsultants (collectively, the "Keller and Heckman Group") have the personnel, expertise, and resources necessary to accomplish the required Scope of Work; and

WHEREAS the City desires to have Consultant serve as prime contractor under this Agreement and to perform said professional consulting services, and Consultant is willing to do so;

NOW, THEREFORE, in consideration of the mutual covenants, promises, terms and conditions herein set forth, City and Consultant have mutually covenanted and by these presents do covenant and agree with each other as follows.

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

ARTICLE 1.00 - DEFINITIONS

1.01 DEFINITIONS

- A. "Approved" and "For Approval," means approved by the City as noted.
- B. "Contract" means this Agreement.
- C. "Notice," means a written notice which has been delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered, or sent by facsimile, or sent by registered or certified mail to the last business address known to the party giving notice.
- D. "Person," means a corporation, partnership, business association of any kind, trust, company, or individual.
- E. "Consultant Program Manager," means the Consultant's designated Program Manager,

John B. Richards
Keller and Heckman
1001 G. Street
Washington, D.C. 20001
(202) 434-4100
- F. "City Program Manager," means the City's designated Program Manager,

Richard E. Wilken
City of San Diego
Communications and Electrical Division
1220 Caminito Centro
San Diego, CA 92102-1801
(619) 525-8650
- G. "Project" means the PCS Consulting Services Contract.
- H. "Consultant Employee," means any officer, partner, employee, or agent of the Consultant.
- I. "Maximum Contract Sum," means the sum specified in this Agreement for Consulting services provided by Consultant in accordance with this Agreement.

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

- J. "Scope of Work," means the services to be performed by the Consultant in accordance with this Agreement.
- K. "Personal Communications Service (PCS)" means the emerging telecommunications service which is presently being implemented by the FCC in the 2 GHz frequency spectrum.
- L. "Request for Proposal (RFP)" refers to the City's document entitled "REQUEST FOR PROPOSALS, 2 GHz MICROWAVE RELOCATION CONSULTING," dated January 4, 1995.
- M. "Consultants Proposal" refers to "THE KELLER AND HECKMAN GROUP" Response dated February 9, 1995.
- N. "Basic Services" refers to those services required in the Scope of Work of this Agreement and detailed in the RFP and Consultant's Proposal dated February 9, 1995.
- O. "Additional Services" refers to those services requested by the City over and above the Scope of Work.
- P. "Additional Compensation" refers to any compensation over and above that which is agreed to in this Agreement.

ARTICLE 2.00 - RESPONSIBILITIES OF CONSULTANT

2.01 GENERAL

- A. The Consultant's services consist of those services enumerated in this Article 2.00 of this Agreement. All of said services shall be performed by the Consultant, the Consultant's employees and any consultants and subconsultants in a manner consistent with the Consultant's Proposal.
- B. The Consultant shall be responsible for the professional quality, technical accuracy, timely completion and coordination of all services furnished by the Consultant, its consultants and subconsultants, and its and their principles, officers, employees and agents under this Agreement.
- C. The Consultant's services, under this Agreement, shall be performed expeditiously and with generally accepted professional skill and a level of care required for the orderly progress of the Scope of Work. The City recognizes that Consultant may reasonably rely upon the services of subconsultants within their respective areas of expertise.

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

- D. The Consultant, and its subconsultants, shall furnish all material, labor, office equipment, facilities and transportation necessary to perform properly and complete in a workmanlike, acceptable manner, the work called for in this Agreement.
- E. The Consultant shall designate, appoint and provide qualified managers and other professional consultants to provide all required work under this Agreement. The professional obligations of such persons shall be undertaken and performed in the interest of the City. Upon request by the City, the Consultant shall furnish the City a copy of the Consultant's contract(s) with its consultants and subconsultants.
- F. The Consultant shall assign John B. Richards to manage the performance of the Consultant's services under this Agreement. Should he or any key employee or consultant or subconsultant of the Consultant be transferred, reassigned, terminated or otherwise unable to complete his or her or their responsibility for any reason, the Consultant shall replace him or her or them with a competent person, consultant or subconsultant reasonably acceptable to City.
- G. The Consultant and its officers and employees, and consultants and subconsultants, shall cooperate with the City in performance of services under this Agreement and shall be available for consultation with the City at such reasonable times with advance notice as to not conflict with their other responsibilities under this Agreement.
- H. The Consultant shall not take any action or do anything which in any manner limits, inhibits, restricts or otherwise infringes on the right and ability of the City to communicate directly with the Consultant throughout the term of this Agreement.
- I. The Consultant shall have no authority to dictate or make decisions concerning the work of the City in the absence of City's written approval. Authority to make or dictate any and all guidelines, decisions, and directives shall be the exclusive right of the City. The Consultant shall review the work of the City for conformity with all pertinent requirements, report the results thereof to the City and assist the City in review and establishment of system directives, but the Consultant shall not have any independent authority or responsibility to make those decisions on behalf of the City.
- J. The City's Request for Proposal, the Contractor's Proposal and all correspondence specifically referenced as attachments to this Agreement, are included in this Agreement. The requirements of this Agreement shall supersede any conflict between the Request for Proposal, the Proposal and this Agreement..

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

2.02 TERM/SCOPE OF WORK

The following services shall be provided by the Consultant from the date executed through the completion of the Agreement. The term of the Agreement is anticipated to be from May 1, 1995 through May 1, 1996. Other services consistent with the Consultant's Proposal are authorized under this Agreement, as necessary in Consultant's discretion to provide services requested in the Request for Proposal. All services rendered by Consultant for Phases I and II shall be completed within the Maximum Contract Sums specified in Article 4.01.

The Consultant shall assign a Program Manager with authority to commit resources of the Consultant's firm as necessary to meet these minimum terms and conditions of this Scope of Services.

PHASE I - PRE-NEGOTIATIONS

- A. Prepare and present a written report to City staff which summarizes the City's existing 2 GHz microwave network including:
- A minimal functional definition of the City's existing 2 GHz microwave network.
 - Assess the impact of wireless service operations on the City's existing 2 GHz microwave system.
 - Identify potential interference to and from existing microwave paths.
 - Identify linkages between affected microwave facilities and wireless service licensees.
- B. Prepare and present a written economic assessment report which reviews the following:
- The value of the vacated spectrum to both the PCS licensee and the City.
 - The affect of waiting the allotted time or vacating the spectrum in short order.
 - The portion of each market and the amount of spectrum in conflict for each MTA (Major Trading Area) and BTA (Basic Trading Area).
 - The potential net profitability of each market to the wireless providers including assignment of a value to the 2 GHz microwave spectrum licensed

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

to the City on the basis of potential profitability and on the portion of the total wireless services market affected by the City's microwave networks.

- A cursory review of any incumbents other than the City who will play a role in the relocation process.
 - Propose a strategy to take with those PCS licensee's who are willing to "wait the City out" in order to minimize their expenses.
- C. Prepare and present a written report for City staff which assess wireless service licensees who will be negotiating with the City. The report should include:
- An analysis of each licensee on the basis of capitalization, spectrum auction bid, business experience, past performance, proposed service offerings, etc.
 - The licensee's ranking among market competitors including an estimate of probable market penetration of each licensee.
 - A forecast of the probable negotiation goals for each licensee.
 - Analyze the other PCS licenses that the incumbent has won, review their cellular holdings, the winners other telecommunications holdings and their market share, the corporate structure of each licensee and their ability to carry out PCS operations.
 - A review of the business expertise of each licensee in general including their technology choice and their negotiation skills and strategies. Analyze how these skills will affect the City's negotiations.
- D. Prepare and present a written report which outlines the options available to the City:
- The report should include such options as fiber, leased circuits or private lines.
 - The projected benefits of early band clearing for the PCS provider. With these items in mind, determine the strategies and tactics required to gain maximum benefit from early band clearing.

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

- Specify what options the City should "put on the table" including the proposed initial asking price, the minimum price to which the City should negotiate to, what information should become public information during the negotiation process and the information the City should solicit from the PCS providers.
- E. Prepare and present a written report which identifies and assesses potential entrepreneurial and operational opportunities. The report should include as a minimum:
- Strategic "partnerships" with wireless services licensees or other microwave licensees; infrastructure leasing; asset sharing.
 - Operational opportunities; e.g., infrastructure upgrades; integration of new wireless services into operational network, etc.
 - Strategic partnerships with both the incumbents and PCS licensees.
 - Feasibility of profitable coalitions with other incumbents and the prospect for joint negotiations.
 - Strategies for negotiations with those PCS licensees which get a "free ride" as a result of early negotiations with the first PCS licensee.
- F. Prepare and present a written report containing recommendations regarding:
- Development of negotiation strategies.
 - Existing/potential franchise fees and other agreements for use of public right of way for the provision of PCS services.
- G. Prepare and present a written report containing legal recommendations in the following areas:
- Analysis of rights and obligations under FCC rules.
 - Drafting of band clearing agreements.

Completion of the following milestones, in the weeks estimated, will be a gauge of Consultant performance.

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

<u>Weeks from Project Start</u>	<u>PHASE I Milestone</u>
---	Prepare and deliver presentations at the start of the project, at major milestones and at the close of the project.
1	Provide a report to City staff which summarizes the existing 2 GHz network.
2	Prepare a report which assess wireless service licensees who will be negotiating with the City.
3	Prepare a report which outlines the options available to the City under the FCC's rules.
4	Prepare an economic assessment report.
5	Prepare a report which identifies and assesses potential entrepreneurial and operational opportunities.
8	Provide recommendations regarding existing/potential franchise and other agreements.
8	Draft band clearing Agreements with wireless licensees.

PHASE II - OPTIONAL

- A. Prepare and present presentations to the City Council and Council Committees.
- B. Provide additional legal assistance in the following areas:
 - Conduct and/or assist the City in conducting negotiations with wireless licensees on behalf of the City.

ARTICLE 3.00 - CHANGES TO SCOPE OF WORK

3.01 GENERAL

- A. The City may at any time, by written order, make changes within the general scope of this Agreement and in the services or work to be performed by the Consultant hereunder. If such changes cause an increase in the Scope of Work, an equitable adjustment will be made and this Agreement will be modified in writing accordingly.

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

- B. Any claim of the Consultant for adjustment of this Agreement under this Article 3.00 shall be asserted in writing within thirty (30) days from the date of receipt by the Consultant of the City's notification of change.
- C. No services for which Additional Compensation is required shall be furnished by the Consultant without prior written authorization of the City.

The Consultant's compensation as defined in Article 4.00 "Basis of Compensation," is the maximum compensation payable under the terms of this Agreement and is subject to adjustment as provided in this Agreement. The Consultant shall not provide services beyond the scope of this Agreement unless those services and compensation for those services have been defined in an approved amendment to this Agreement. No one other than representatives of the City can bind the City with regard to payment for services which exceed the amount payable under the terms of the Agreement.

ARTICLE 4.00 - BASIS OF COMPENSATION

4.01 BASIC SERVICES

- A. In consideration of the performance of the Scope of Work herein contained on the part of the Consultant, the City agrees to pay the Consultant for performing the services as described in Article 2.00, of this Agreement, based on the following hourly rates, which include all direct costs, salaries, fringe benefits, overhead and profit as well as xeroxing at Consultant's and subconsultant's offices. Said sums shall also include all business related fees, licenses, permits, insurance, business and occupation taxes, state and local sales taxes and consumer taxes, which are legally enacted as of the date of this Agreement, whether or not yet in effect and shall be subject to adjustment as provided in this Agreement.

<u>PERSON</u>	<u>POSITION</u>	<u>HOURLY RATE</u>
John B. Richards	Project Manager	\$216
Raymond A. Kowalski	Project Attorney	\$238
Jonathan Spencer	Project Attorney	\$171
Dr. Charles L. Jackson	Project Engineer	\$270
Dr. Jeffrey H. Rohlf	Project Economist	\$270
Mark E. Crosby	Spectrum Management	\$180
Klaus Bender	Microwave Engineer	\$ 90
John Eger	Strategic Planning	\$270
Dr. Nguyen T. Quan	Economic Forecasting	\$157

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

For Phase I the Maximum Contract Sum shall not exceed one hundred eighty-five thousand dollars (\$185,000).

Phase II, optional, shall be executed only upon prior written City approval. The Phase II Maximum Contract Sum shall not exceed sixty thousand dollars (\$60,000).

- B. The hourly rates as set forth in this Article 4 shall remain in force through June 30, 1997, without adjustment. In the event that City wishes to extend this Agreement beyond June 30, 1997 then the rates shall be adjusted by a factor of 1.0 times the increase in the Consumer Price Index for Washington, D.C. from April 1995.
- C. The parties hereto acknowledge that the Maximum Contract Sum for both Phase I and Phase II are initially established through joint estimate of the required Scope of Work. The actual Phase Contract Sums may be lower than so estimated.

4.02 REIMBURSABLE EXPENSES

- A. Reimbursable expense allowance - The above Maximum Contract Sum includes reimbursable expenses in an amount that shall not exceed 10% of the Maximum Contract Sum without prior written authorization of City. Reimbursable expenses shall be billed at the actual cost for travel, long distance telephone and job related expenses for all Consultant's staff including per diem expenses for Consultant's staff.
- B. No markup will be charged on those Consultant's subconsultants.
- C. Travel and Per Diem Expenses: Consultant shall be reimbursed for travel and per diem expenses and other direct expenses for home office employees (not including on-site representatives) in accordance with Consultant's established policies. If Consultant's employees travel by private or commercial coach aircraft, Consultant will be reimbursed at commercial coach airline rates for the class of fair authorized for equivalent Consultant's employees under Consultants established policies. For any part of the route for which there is no regularly scheduled commercial coach air service, reimbursement shall be at rates published by Consultant from time to time. Per diem reimbursement includes meals and accommodation expenses.

Per diem expenses shall be as follows:

1. Overnight accommodations: \$140.00 per person per day.
2. Away from home base, but not overnight: \$25.00 per person per day.

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4.03 LEVEL OF EFFORTS

- A. Maximum Contract Sum is based upon the initial project management team of nine professionals as set forth below. Additional employees or partners of Consultant, under the guidance, supervision and control of Consultant, may be authorized to perform services under this Agreement upon prior written notification to and approval of the City.
- B. The Consultant will provide the following named individuals, who shall be primarily responsible for performance of the services hereunder.

<u>PERSON</u>	<u>POSITION</u>
John B. Richards	Project Manager
Raymond A. Kowalski	Project Attorney
Jonathan Spencer	Project Attorney
Dr. Charles L. Jackson	Project Engineer
Dr. Jeffrey H. Rohlfs	Project Economist
Mark E. Crosby	Spectrum Management
Klaus Bender	Microwave Engineer
John Eger	Strategic Planning
Dr. Nguyen T. Quan	Economic Forecasting

- C. In the event the City reasonably determines that any of the forgoing individuals has not properly discharged his duties, the Consultant, upon receipt of written notice from the City so stating, shall promptly replace such individual with a qualified individual, subject to the prior written approval of the City.

4.04 ADDITIONAL SERVICES

- A. If City requires any Additional Services not included as part of the Basic Services from the Consultant, payment for such services shall be based on the hourly rates specified in Article 4.02. If City elects not to increase the Maximum Contract Sum, then Consultant shall not be obligated to perform Additional Services hereunder beyond those services for which said Maximum Contract Sum covers. In the event City elects to increase the Maximum Contract Sum necessary to complete the Additional Services, then Consultant agrees to complete said Additional Services or to continue services to the extent that said Maximum Contract Sum has been increased.

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4.05 NO DEDUCTION IN PAYMENTS

- A. No deduction will be made by City from any payment due the Consultant on account of penalties, liquidated damages or other sums withheld from payments on account of the cost of changes in the Scope of Work, claims or lawsuits through no fault of the Consultant.

4.06 BILLING AND PAYMENT

- A. Monthly Billing - On or about the fifteenth (15th) day of each month, Consultant shall furnish the City with a detailed progress invoice of all professional services rendered and reimbursable expenses incurred during the preceding calendar month. Fees for Services shall be billed in accordance with the Scope of Work. Each progress invoice will be supported by vendors' invoices, expense reports, and any other documentation necessary to substantiate the basic fees and reimbursable expenses. Each invoice shall summarize previous billings, and any balance remaining, separately identified from the current billing. City shall pay the invoiced amount within thirty (30) calendar days after receipt of the invoice.
- B. Final Billing - Upon termination of this Agreement, Consultant shall submit a statement summarizing previous billings rendered, payments received and any balance remaining. Added to such statement, and properly supported by documentary evidence of expenditure, shall be any changes to the total cost of the Services not reported previously. Within thirty (30) days after receipt thereof, City shall pay Consultant all remaining amounts due.

ARTICLE 5.00 - EQUAL OPPORTUNITY

5.01 EQUAL OPPORTUNITY POLICY

The City of San Diego will not discriminate with regard to race, religious creed, color, national origin, ancestry, physical handicap, marital status, sex or age in the award of contracts.

5.02 EQUAL OPPORTUNITY CONTRACTING

The Subconsultant List (EOP-5) or facsimile is a part of this Agreement. All subcontractors have been listed and it is agreed that no changes to the subconsultant list will be allowed without prior written approval from the City. Subconsultants are expected to complete a minimum of 75% of their listed scope of work with their own workforces.

Consultant shall submit to the Project Manager statistical information as requested in the City of San Diego Contract Activity Report indicating the amount of sub-contracting

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provided by firms during the period covered by the report. This information should be accompanied by an invoice from each sub-consultant/subcontractor/vendor/service provider listed in the report. Consultant agrees to issue payment to each of the firms listed within 14 days after City release of funds, or be assessed a penalty of 2% of the amount due each firm for each month or portion of a month in which payment is not made.

5.03 EQUAL EMPLOYMENT OPPORTUNITY

Consultant and each of its Subconsultants will comply with Title VII of the Civil Rights Act of 1964, as amended, Executive Orders 11246, 11375, and 12086, the California Fair Employment Practices Act, and any other applicable federal and state laws and regulations hereinafter enacted. Consultant will not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability medical condition or place of birth.

Upon request by the City of San Diego, Consultant will submit a current Workforce Report and, if required, an Equal Employment Opportunity Plan which sets forth the actions that Consultant will take to achieve the City's goals for the employment of African Americans, American Indians, Asians, Filipinos, Latinos, Women and people with disabilities.

Further, consultant will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this Agreement so that such provisions will be binding upon each subconsultant.

5.04 LOCAL BUSINESS AND EMPLOYMENT

Consultant acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms on all City contracts. Consultant will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts for work associated with this Agreement from local residents and firms as opportunities occur. Consultant agrees to hire qualified local residents and firms whenever feasible.

Consultant understands that failure to comply with the above requirements, and/or submitting false information in response to these requirements, may result in withholding progress payments until Consultant complies with above, or termination of this Agreement, and/or suspension from participating in future City contracts as a prime or subconsultant, for a period of not less than one (1) year. For additional or subsequent violation, the period of suspension may be extended for a period of up to three years. Failure to satisfy penalties imposed pursuant to this section shall prohibit consultant from participating in future City contracts until all penalties have been satisfied.

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ARTICLE 6.00 - DRUG-FREE WORKPLACE

6.01 DRUG-FREE WORKPLACE

All City projects are now subject to City of San Diego Resolution No. R-277952 adopted on May 20, 1991. All responders should be aware of the provisions of Council Policy 100-17 which was established by the above numbered resolution. The policy applies equally to the contractor and all subcontractors. The elements of the policy are outlined below.

1. "Drug-free workplace" means a site for the performance of work done in connection with a contract let by City of San Diego for the construction, maintenance, or repair of any facility or public work by an entity at which employees of the entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this section.
2. "Employee" means the employee of a contractor directly engaged in the performance of work pursuant to a contract as described in Section C.
3. "Controlled substance" means a controlled substance in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. Sec. 812).
4. "Contractor" means the department, division, or other unit of a person or organization responsible to the contractor for the performance of a portion of the work under the contract.

CITY CONTRACTOR REQUIREMENTS

1. Every person or organization awarded a contract or grant by the City of San Diego for the provision of services shall certify to the city that it will provide a drug-free workplace by doing all of the following:
 - a. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's organization's workplace and specifying the actions that be taken against employees for violations of the prohibition.

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b. Establishing a drug-free awareness program to inform employees about all of the following:

- (1) The dangers of drug abuse in the workplace.
- (2) The person's or organization's policy of maintaining a drug-free workplace.
- (3) Any available drug counseling, rehabilitation, and employee assistance programs.
- (4) The penalties that may be imposed upon employees for drug use violations.

c. Posting the statement required by subdivision (1) in a prominent place at contractor's main office. For projects large enough to necessitate a construction trailer at the job site, the required signage would also be posted at the job site.

2. Contractors shall include in each subcontract agreement language which indicates the subcontractor's agreement to abide by the provisions of subdivisions a. through c. inclusive of Section c1. Contractors and subcontractors shall be individually responsible for their own drug-free workplace programs.

Note: The requirements of a drug-free awareness program can be satisfied by periodic tailgate sessions covering the various aspects of drug-abuse education. Although an in-house employee assistance program is not required, contractors should be able to provide a listing of drug rehabilitation and counseling programs available in the community at large.

ARTICLE 7.00 - INSURANCE

7.01 GENERAL

- A. The Consultant shall not commence work under this Agreement until the Consultant has provided a certificate for all insurance required hereunder. Approval of the insurance by the City shall not relieve or decrease the liability of the Consultant. Companies writing the insurance under this article shall be licensed to do business by the State of California.
- B. All required insurance policies shall be maintained continuously through the term of this Agreement. All insurance costs are included in the Maximum Contract Sum.

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7.02 COVERAGE

- A. The Consultant shall, prior to execution of this Agreement, furnished the City with certificates of insurance for coverages as required below.**
- B. The Consultant shall maintain the following types of insurance coverage during the term of this Agreement. This insurance shall cover all of the Consultant's employees to be engaged in work under this Agreement, and the same shall be required of all consultants and subconsultants of the Consultant.**
 - 1. Commercial General Liability Insurance Policy;**
 - 2. Commercial Automobile Liability including (a) hired and (b) non-owned automobile; and**
 - 3. Worker's Compensation Coverage - Consultant shall comply with all requirements and regulations of the State of California for obtaining and maintaining adequate Worker's Compensation insurance.**
 - 4. "Errors and Omissions" Insurance.**

7.03 AMOUNT OF COVERAGE

- A. General Liability: General Liability coverage shall be on an "occurrence" basis only and not on a "claims made" basis. Consultant shall maintain limits of no less than \$1,000,000 combined single limit per occurrence for bodily injury and death, personal injury and property damages.**
- B. Automobile Liability: Automobile Liability shall include, at a minimum, but need not be limited to, coverages against claims for injuries or death to persons or damages to property which arise from or in connection with the ownership, maintenance or use of any motor vehicle whether owned, hired or non-owned, in the performance of work under this Agreement by the Consultant, its agents, representatives, employees or its consultants or subconsultants. The Consultant shall maintain limits of no less than \$1,000,000 combined single limit per accident for bodily injury or death, personal injury and property damage.**
- C. Workers Compensation: Workers Compensation Insurance shall be provided as required by the State of California.**
- D. Errors and Omission: Errors and Omissions Insurance shall be provided as agreed to by City.**